FILED
JAN 31 1992
OFFICE OF THE CLERK

No. 91-453

In The

Supreme Court of the United States

October Term, 1991

DAVID H. LUCAS,

Petitioner,

v.

SOUTH CAROLINA COASTAL COUNCIL,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA

Brief of the States of Florida, Alabama, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New Hampshire, New York, North Carolina, Oregon, Pennsylvania, Rhode Island and the Rhode Island Coastal Resources Commission, Utah, Vermont, Virginia, Wisconsin, Texas, and the Territory of Guam and Commonwealth of Puerto Rico as Amici Curiae in Support of Respondent

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INTEREST OF AMICI

Amici respectfully submit this brief in support of the respondent pursuant to Rule 37, Rules of the Supreme Court of the United States.

The states that have joined as amici in this case, together with their many political subdivisions, exercise a broad range of regulatory powers within their respective jurisdictions. They are charged with the difficult and delicate responsibility of balancing demands for development against public health and safety concerns. This appeal raises, for the first time in the course of this suit, the question of whether petitioner's land, located in a hazardous area, is suited for development and what dangers would attend that development. Although the property in question here is beachfront land and thus of particular interest to the coastal states, all states that attempt to regulate or restrain development of land exposed to the hazards and ravages of nature must be concerned with the outcome.

Since the passage of the Federal Coastal Zone Management Act in 1972 that required the states to better control coastal development, every coastal state has enacted laws to protect its coastline.[1] Countless jurisdictions have

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1 The Coastal Zone Management Act, 16 U.S.C. §§ 1451-1464, administered by NOAA, directs that states minimize loss of life and property caused by improper development in flood-prone, storm surge and erosion-prone areas and by destruction of beaches, dunes and barrier islands. *See* 16 U.S.C. §§ 1452(2)(B), 1456(b)(2). The 1990 amendments direct that state programs prevent or significantly reduce threats to life and property by eliminating development and redevelopment in high-hazard areas. *See* 16 U.S.C. § 1458(a)(2)(1990).

The following 24 states have enacted laws for protection of coastal areas: Alabama, Coastal Area Management Act, Ala. Code §§ 9-7-10 to 9-7-20 (1987); Alaska, Coastal Management Program Law, Alaska Stat. §§ 46.40.010 to 46.40.210 (1987); California Coastal Act, Ca. Pub. Res. Code §§ 30000-30900 (West 1986); McAteer-Petris Act, Ca. Govt. Code

§ 66600 *et seq.* (West 1991); Connecticut, Inland Wetlands and Watercourses Act, Conn. Gen. Stat. §§ 22a-36 to 22a-45 (1985), Coastal Management Act, Conn. Gen. Stat. §§ 22a-90 to 22a-113 (1985), Tidal Wetlands Act, Conn. Gen. Stat. §§ 22a-28 to 22a-35 (1985); Delaware Beach Preservation Act, 7 Del. Code Ch. 68, Coastal Zone Act, 7 Del. Code Ch. 70 (1990), Wetlands Act, 7 Del. Code Ch. 66 (1983); Florida, Beach and Shore Preservation Act, Fla. Stat. §§ 161.011-161.58 (1988), Coastal Management Act, Fla. Stat. §§ 380.19-380.27 (1978), Wetlands Protection Act, Fla. Stat. §§ 403.901-403.938 (1990); Georgia, Coastal Marshlands Protection Act of 1970, Ga. Code Ann. §§ 12-5-280 to 12-5-292 (1982 & Supp. 1987), Shore Assistance Act of 1979, Ga. Code Ann. §§ 12-5-230 to 12-5-246 (1982 & Supp. 1987); Hawaii, Coastal Zone Management Law, Haw. Rev. Stat. §§ 205A-1 to 205A-49 (1988 & Supp. 1990); Louisiana, State and Local Coastal Resources Management Act of 1978, La. Rev. Stat. Ann. §§ 49:213.1-49:214.41 (Supp. 1990); Maine, Natural Resources Protection Act, Me. Rev. Stat. Ann. tit. 38, §§ 480A-490 (1990), Shoreland Protection Act, Me. Rev. Stat. Ann. tit. 38, §§ 435-447 (1964 & Supp. 1987); Maryland, Wetlands Law, Md. Nat. Res. Code Ann. §§ 9-101 to 9.603 (1990 & 1991 Supp.), Beach Erosion Control and Replenishment Act, Md. Nat. Res. Code Ann. §§ 8-1101 to 8-1105.1 (1990 and 1991 Supp.); Massachusetts, Wetlands Protection Laws, Mass. Gen. L. ch. 130, § 105, ch. 131 §§ 40-42 (1979 & Supp. 1987); Michigan, Shorelands Protection and Management Act of 1970, Mich. Comp. Laws Ann. §§ 281.631-281-644 (1979), Goemare-Anderson Wetland Protection Act, Mich. Comp. Laws Ann. §§ 81-701-281.722 (Supp. 1987); Mississippi, Coastal Wetlands Protection Law, Miss. Code Ann. §§ 49-27-1 to 49-27-69 (1990); New Hampshire, Wetlands Act, N.H. Rev. Stat. Ann. §§ 483-A:1 to 483-A:8 (1983 & Supp. 1986); New Jersey, Coastal Area Facility Review Act, N.J. Stat. Ann. §§ 13:19-1 to 13:19-23 (West 1979 & Supp. 1987), Wetlands Act of 1970, N.J. Stat. Ann. §§ 13:9A-1 to 13:9A-10 (West 1979 & Supp. 1987); New York, Waterfront Revitalization and Coastal Resources Act, Exec. Law Art. 42 (McKinney 1984); Freshwater Wetlands Act, N.Y. Envtl. Conserv. Laws §§ 24-0101 to 24-1305 (McKinney 1984 & Supp. 1988), Tidal Wetlands Act, N.Y. Envtl. Conserv. Law §§ 25-0101 to 25-0601 (McKinney 1984), Coastal Erosion Law, N.Y. Envtl. Conserv. Law §§ 34-0101 to 34-0113 (McKinney 1984); North Carolina, Coastal Area Management Act of 1974, N.C. Gen. Stat. §§ 113A-100 to 113A-128 (1987); Ohio, Shore Erosion Law, Ohio Rev. Code Ann. §§ 1507.01-1507.13, 1507.99 (Page 1986); Rhode Island, Wetlands Laws, R.I. Gen. Laws §§ 2-1-13 to 2-1-27 (1987), Coastal Resources Management Law., R.I. Gen. Laws §§ 46-23-1 to 46-23-18 (1987); South Carolina, Coastal Zone Management Act, S.C. Code Ann. §§ 48-39-10 to 48-39-220 (Law Co-op. 1987) Texas Coastal Management Plan Act, (Ch. 295, 1991 Tex. Sess. Law Serv. 1220 (Vernon); Virginia, Coastal Primary Sand Dune

also passed laws to control development in floodplains. The dangers that have prompted adoption of these laws are obvious and indisputable, and were not even questioned by the petitioner below. Yet now having avoided the making of a record that would drive home those dangers, petitioner suggests the South Carolina law has little to do with public health and safety, and that, in any event, he is entitled to compensation regardless of the dangers the law would curb.

A decision that adopts petitioner's radical reformulation of takings jurisprudence and that sanctions the procedural maneuvering by which petitioner averted any examination of the South Carolina law and the hazards it sought to control would gravely impair government in the exercise of its police power responsibilities. Ultimately, of course, it is not government that will suffer, but the citizens who depend on it for protection of their health and safety.

STATEMENT OF THE CASE

Petitioner, David H. Lucas, is the fee owner of two undeveloped, oceanfront lots located in the Wild Dunes Development on the Isle of Palms, a barrier island. In 1988 South Carolina's Coastal Zone Management Act was amended by the Beachfront Management Act. S.C. Code section 48-39-10 *et seq.* (the "Act"). The 1988 Act required the respondent to impose setback lines along the coast of South Carolina. These lines are referred to in the Beachfront

Protection Act, Va. Code Ann. §§ 62.1-13.21 to 62.1-13.28 (1987), Wetlands Act Va. Code Ann. §§ 62-13.1 to 62.1-13.20 (1987); and Washington, Shoreline Management Act of 1971, Wash. Rev. Code §§ 90.58.010-90.58.930 (Supp. 1987).

According to NOAA, the following 14 states implement NOAA-approved beach set-back laws: Maine, Delaware, Florida, Wisconsin, Rhode Island, Maryland, Alabama, Hawaii, New York, North Carolina, Michigan, New Jersey, South Carolina, Pennsylvania.

Management Act as a baseline and a setback line. No habitable structure can be built seaward of the baseline in this "critical area." The two lots owned by Mr. Lucas lie entirely seaward of the established baseline.[2]

Petitioner brought this action asserting that the restrictions on the use of his two lots amounted to a taking of his private property for public purposes, and that he was therefore constitutionally entitled to receive just compensation. (*See* Complaint, R. 5-8) The complaint did not challenge the constitutionality of the Beachfront Management Act nor did it contend that the Act's legislative purposes were not served by its application to petitioner's property.[3] Petitioner simply maintained that he was entitled to compensation under the Constitution of the United States and the Constitution of the State of South Carolina because he was deprived of the use of his property. *Id.*

Prior to trial, the parties stipulated that, under the Act, the methodology for setting the baseline is to determine the most landward position of the shoreline during the past forty years and to set a baseline at that point. Application of that methodology in this case resulted in a baseline that was entirely landward of Mr. Lucas' two lots (R. 13). At trial,

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2 The 1988 amendments were prompted by a report of an appointed Blue Ribbon Committee on Beachfront Management that had found the "South Carolina beach/dune system is...in a state of crisis" and that 57 of the State's 198 miles of shoreline were "critically eroding." One of the primary causes was poorly planned development which encroached upon the beach/dune system and accelerated its erosion. This system was the "first line of defense in protecting life and property against the ravages of storms and shoreline erosion." *Report of South Carolina Blue Ribbon Committee on Beachfront Management,* Myrtle Beach, 1987, pp. i, ii, 1-2.

3 Mr. Lucas' counsel acknowledged at trial that Mr. Lucas was not raising any issue as to the Act (R. 68), and the trial court so found in its final order (R. 125). Nor did Mr. Lucas ever challenge the location of the baseline (R. 40, 98).

petitioner's witness acknowledged the occurrence of severe beach erosion in the vicinity of the Lucas lots as recently as 1983 (R. 20-21). Mr. Lucas himself admitted that at that time the scarp line was at the face of one of the ocean front buildings in Wild Dunes (R. 37).

An expert in coastal engineering, testifying for the Council, stated that the interim baseline was set on the Lucas lots at "the most landward point of erosion or the most landward location of the shoreline over the last forty years," which occurred in 1963 (R. 71). The Act required this for "inlet erosion zones," which are particularly unstable. S.C. Code § 48-39-280. Petitioner's lots are in such a zone. Between 1957 and 1963, the area underwent severe erosion and the shoreline was "on the order of a hundred to a hundred and fifty feet behind the landward most lot line [of the Lucas property]" (R. 79; *see also* R. 83). As recently as 1973, the Lucas lots were partly covered by a tidal pond (R. 80). With respect to the erosion occurring in 1983, the expert testified that without emergency "shoal scraping" and subsequent beach nourishment, the house on lot 20, two lots to the west of the Lucas property, would have been threatened by erosion (R. 87-88).[4]

Lengthy revetments now lie to the east and west of the lots (R. 100-101). The area in the vicinity of the Lucas lots, according to the coastal engineer, is very dynamic and is subject to both erosion and accretion, depending upon the presence of offshore shoals (R. 76-77). Although it is not possible to predict the occurrence of shoals or periods in which they occur (R. 76-77), this expert thought it a "likelihood" that the shoreline could again recede as far back as the 1963 line (R. 80-81). It is possible, he pointed out, for

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4 The sand-scraping process requires the use of front end loaders to scrape sand from shoals at low tide and to put the sand in areas that require protection from erosion(R. 100-101).

a storm to remove hundreds of feet of beaches and dunes in just a matter of hours (R. 64).

The final order of the trial court found that the prohibition on construction deprived Mr. Lucas of any reasonable economic use of the lots, rendered them valueless, and effected a "total taking" (R. 127-129). On appeal, the Supreme Court of South Carolina reversed, ruling that Mr. Lucas was bound by the legislative findings that he did not contest, that prohibition of new construction in close proximity to the beach/dune area was necessary to prevent great public harm, and that the case was controlled by the nuisance exception to the Takings Clause recognized in *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470 (1987), and a long line of Supreme Court decisions. *Lucas v. South Carolina Coastal Council,* 404 S.E.2d 895 (S.C. 1991).

In 1990, the state legislature amended the Act to permit new construction seaward of the baseline pursuant to a special permit. S.C. Code Section 48-39-290(D). Under that amendment, Lucas could seek a permit to construct single family residences on the lots in question.

SUMMARY OF THE ARGUMENT

I. This appeal should be dismissed because petitioner never challenged the Act or its application to his property. One of the basic rules of this Court is that it does not decide questions that were not raised in the lower courts. Petitioner argues for the first time that the Act does not prevent harm. The amici States assert that the Act does prevent serious public harm and that this issue, with such wide-ranging implications for the States, should not be decided in the absence of an appropriate record. Moreover, because petitioner may have been entitled to a permit under

the 1988 Act as well as the 1990 amendments, his taking claim is not ripe for review. As an alternative, therefore, the Court could remand this case to enable petitioner to seek a permit.

II. Prohibition of permanent structures on the beach/dune system can help prevent erosion of the beaches and dunes and thus preserve the protection the dunes afford against storm surges and flooding. Wind-blown debris from houses destroyed by storms and hurricanes can be very destructive; the Act serves to reduce the hazards such debris poses to inland residents and property. Decisions of this Court have repeatedly held that uses of property with such attendant dangers and destructive effects can be prohibited without any requirement for compensation. Furthermore, because petitioner simply demanded compensation and never sought to challenge the purpose and operation of the Act, he did not prove a taking and is therefore not entitled to compensation.

III. All three factors under the *"ad hoc"* takings inquiry weigh in favor of South Carolina. In protecting lives and property, the Act serves the most compelling state interest. Given the exposed site of the property and its vulnerability to erosion or submergence, petitioner could not have had a reasonable expectation that it was suitable for permanent structures. The economic impact or the decline in value is not significant if it properly omits value created through public subsidies of various sorts. Government should not pay for the value it created when such value must be adjusted to protect the public health and safety or for value attributable to a harmful use.

ARGUMENT

I. BECAUSE PETITIONER FAILED TO CHALLENGE THE PURPOSES OR APPLICATION OF THE BEACHFRONT MANAGEMENT ACT AND FAILED TO SEEK A PERMIT, THIS APPEAL SHOULD BE DISMISSED.

Petitioner's brief argues for the first time in the course of this case that the Act was not directed at preventing public harm. (Br. at 38 *et seq.*) Petitioner never challenged the Act in the trial court and never asserted this argument in the appeal below. His seven page brief before the South Carolina Supreme Court merely argued that if he could not use his property, no matter the reason, he was entitled to compensation under the Fifth Amendment. He now asks this Court to rule categorically that the Act prevents public harm, if at all, in only the most marginal sense. The Court should not entertain this argument.[5]

It is an established principle of this Court that it does not decide questions not raised in the lower court. *Delta Airlines v. August,* 450 U.S. 346, 362 (1981); *Youakim v. Miller,* 425 U.S. 231, 234 (1976). That principle should apply with particular force here.

To construe the Act as petitioner asks would undercut the laws of every coastal state that restricts or prohibits

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5 The Supreme Court of South Carolina concluded that petitioner

> concede[d] that the beach/dune area of South Carolina's shores is an extremely valuable public resource, that the erection of new construction, *inter alia,* contributes to the erosion and destruction of this public resources; *and that discouraging new construction in close proximity to the beach/dune area is necessary to prevent a great public harm.*

Lucas v. South Carolina Coastal Council, 404 S.E.2d 895, 898 (S.C. 1991) (emphasis added).

construction on the beach/dune system and by extension many other laws similarly affecting building in areas subject to flooding and other known hazards. Petitioner has assiduously avoided pleading and trying an issue that would have enabled the Council to prove the very real dangers attendant to development on the beach/dune system. Those dangers cannot be adequately demonstrated for the first time in this Court. Nevertheless, because they are so acute, the amici States will discuss them in this brief.

Most importantly, the ruling petitioner seeks, that the Act and laws like it do not prevent harm, would be inappropriate in the complete absence of a relevant record. Little in the way of helpful guidance could be provided the other states that inevitably will be forced to defend their laws. Moreover, consideration of his argument would encourage other potential plaintiffs raising a takings claim to forego any challenge to similar laws in hopes of inducing the government not to make a record. Government, for reasons of economy, may understandably limit its defense to find, on appeal, that the burden of proof has shifted and it has only sparse legislative findings to rebut a statutory challenge.

Given petitioner's tactical choice and the fact that this Court has consistently recognized the nuisance exception to the Takings Clause, the States submit that the proper disposition of this case is dismissal, not remand. Petitioner is not entitled to another opportunity to try an issue he chose to concede. Should the Court not be inclined to dismiss, the States strongly urge that it remand the case for consideration of petitioner's entitlement to a permit under the 1988 or 1990 amendments to the Act and for development of a record, if necessary, on the harms the Act would prevent. Allowing a landowner to collect compensation without being required to seek a variance or other administrative relief is a severe intrusion on state prerogatives and would be financially disastrous to government. Such a result is clearly

contrary to this Court's precedents. *See Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 190 (1985), and *United States v. Riverside Bayview Homes*, 474 U.S. 121, 126 (1985).[6] The Takings Clause permits government to take and pay for property when necessary; it is not a grant of authority to courts or landowners to foist property upon states that do not want it.

II. GOVERNMENT REGULATION UNDER THE POLICE POWER DOES NOT AMOUNT TO A TAKING IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS WHERE IT PREVENTS A LANDOWNER FROM MAKING A HARMFUL USE OF HIS LAND.

A. Beachfront Protection Laws Serve Valid Police Power Purposes And Are Intended To Prevent Great Public Harm.

The South Carolina Beachfront Management Act of 1988, S.C. Code Section 48-39-10 *et seq.*, serves a number of critical purposes that are embodied in specific legislative findings. The Act includes findings that, *inter alia:*

> 1. The beach/dune system protects life and property by serving as a storm barrier which dissipates wave energy and contributes to shoreline stability in an economical and effective manner;
>
> 2. Many miles of South Carolina's beaches have been identified as critically eroding;
>
> 3. Development on the beach/dune system has jeopardized the stability of the system, accelerated erosion, and endangered adjacent property;
>
> 4. Erosion, although a natural process, becomes a significant problem for man only when structures are created in close proximity to the beach/dune system. It is in both the public and private interests to afford the beach/dune system space to accrete and erode in its natural cycle.

See S.C. Code section 48-39-250.

The Act therefore announced a policy to

> (1)protect, preserve, restore and enhance the beach/dune system, the highest and best uses of which are declared to provide:
>
> (a) a barrier and buffer from high tides, storm surge, hurricanes, and normal erosion....
>
> * * * *

S.C. Code section 48-39-260.

The severity and scope of the problem addressed — construction of buildings on the sand dunes — may not be fully conveyed by the characteristically terse legislative findings. Construction on the dunes can cause widespread and catastrophic harm. A full understanding of this problem dispels any suspicion that the intent of the Act was simply to ensure beaches attractive to tourists and that any prohibition

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6 The trial court ruled without explanation that administrative relief in the form of a permit was not appropriate (R. 125) although the 1977 Act in § 48-39-180 clearly contemplated such relief. The South Carolina Supreme Court did not address this issue, although it was preserved and argued by the council (R. 134 and Brief at 41). This Court has ruled that once a taking has occurred the government retains the option of withdrawing its action or exercising its eminent domain power. *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304, 321 (1987). Respondent was not afforded this option.

on construction was intended to benefit the many at the expense of the few.

The pernicious effects of construction on beach sand dunes are well documented in the legal and scientific literature. *See* Maloney and O'Donnell, *Drawing the Line at the Oceanfront,* 30 Fla.L.Rev. 383, 389-391 (1978); Hwang, *Shoreline Setback Regulations and the Takings Analysis,* 13 U. Haw. L. Rev. 1, 1-4, 37 (1991); Watson and Sedgley, *Land Use Regulation By the Virginia Marine Resources Commission,* 7 Va. J. Nat. Res. L. 381, 387-388 (1987); Skelton, *Houses on the Sand: Takings Issues Surrounding Statutory Restrictions on the Use of Oceanfront Property,* 18 B.C. Envtl. Aff. L. Rev. 125, 125-127 (1990); Comment, *Shifting Sands and Shifting Doctrines: The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute,* 79 Calif.L.Rev. 205 (1991).[7] The beaches and near-shore sand system absorb the erosive force of ocean tides and waves and serve as natural storm breaks, buffering severe winds and tides before they reach more populous inland areas. Coastal dunes serve as reservoirs of sand, retaining wind-driven sand and supplying it to the beaches as they are worn down by wave action. The protective mass of dunes that are relatively intact provides

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7 These commentators cite such works as W. Kaufman & O. Pilkey, *The Beaches Are Moving: The Drowning of America's Shoreline* 27 (1979); P. Boaden & R. Seed, *An Introduction to Coastal Ecology* 129-134 (1985); L. White, *Life in the Shifting Sand Dunes* (1976); *Ecological Processes in Coastal Environments* (R. Jefferies & A. Davy eds. 1979); J. Titus, *The Causes and Effects of Sea Level Rise,* in Impact of Sea Level Rise on Society (H. Wind ed. 1987); Owens, *Where Erosion and Development Meet,* EPA Journal, Sept.-Oct. 1989 at 45; Pilkey, *America's Beaches: An Endangered Species?,* SEA Grant Today, Nov.-Dec. 1981 at 14: I. McHarg, *Design With Nature* 7 (1969). *See also* R. Weggel, S. Brown, and E. Doheny, "The Cost of Defending Developed Shorelines Along Sheltered Waters of the United States" in USEPA *The Potential Effects of Global Climate Change on the United States,* (USEPA EPA-230-05-89-050, Washington, D.C. December 1989).

flood protection during storm surges.[8] When the dune system can no longer renourish the beach, the erosion will accelerate and may eventually reach structures on the dunes.

Development along barrier islands and sand dunes has the effect of damaging and eroding the natural sand dune barrier both by displacing and destroying the dune and by eliminating stabilizing vegetation. *See,* Comment, *supra,* 79 Calif.L.Rev. 213-214. Another commentator has observed:

> Although any beach will change with time, those on which the dunes are left relatively undisturbed stand the best chance of surviving with minimal change. The developed areas south of Virginia Beach are prime examples of these phenomena. There, the beaches are widest where beach structures are placed behind the primary row of sand dunes, walkways are constructed over rather than through the dunes, sand fences are placed to aid the natural processes of dune building, and appropriate vegetation is planted on newly-formed dunes. Where these precautions are not observed, or where the dunes have been leveled to make room for homes, the beach is narrower; in some cases the waves now break under the pilings that support the homes.

Watson and Sedgley, *supra,* 7 Va. J. Nat.Res.L. 387-388 (footnotes omitted).

The dangers of development upon the beach/dune system are wide-ranging and threatening to public safety as well as

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8 J. Clark, *Coastal Ecosystem Management: A Technical Manual for the Conservation of Coastal Zone Resources,* pp. 318, 336, 566; Report of the Barrier Island Work Group, U.S. Department of Interior (1978) ("Barrier Island Work Group Report") at 13.

public resources. This problem will only worsen as sea levels rise.[9] As beachfront homes, hotels and other structures proliferate, inland flood protection is reduced. Beachfront structures are themselves particularly vulnerable to destruction by hurricanes and severe storms and their wind-driven debris may severely damage more inland houses and structures.[10] Where beachfront development is dependent upon septic tanks, storms may transport their contents into valuable bays and estuaries, preventing the harvesting of shellfish and other marine resources. Infrastructure created at public expense to serve and sustain beachfront development — e.g., roads, bridges, telephone and electric lines, gas lines, water and sewer lines — may be damaged or destroyed by severe storms. The public bears the risk of greater damage caused by increased flood hazards and wind-driven debris. The public likewise bears the cost of disaster relief and repair and replacement of infrastructure that principally

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9 Rising sea levels will exacerbate erosion, increase the loss of protective beaches and provide a higher base level for storm surges. *See* Titus, "Greenhouse Effect, Sea Level Rise and Coastal Zone Management," 14 *Coastal Zone Management Journal No. 3* at 155 (1986). A hurricane's storm surge may range from 4 to 20 feet above sea level. *See* Godschalk, Brower and Beatley, "Catastrophic Coastal Storms" at 19 (Duke University Press 1989).

Hurricane Hugo, which struck South Carolina in 1989, caused a storm surge 20 feet above mean sea level to sweep over three developed barrier islands, including the Isle of Palms, off Charleston, S.C. See Platt, Bretley and Miller, "Coastal Erosion: Our Retreat from the Tide," *Environment,* Nov. 1991.

10 *See* discussion in Comment, *Shifting Sands and Shifting Doctrines, The Supreme Court's Changing Takings Doctrine and South Carolina's Coastal Zone Statute,* 79 Calif.L.Rev. 205, 212-213 (1991), of the 29 deaths and $6 billion in property damage Hurricane Hugo caused in 1989 in South Carolina alone. The author suggests that "[m]uch of the damage was likely the result of coastal zone mismanagement."

In South Carolina even storm resistant structures were damaged by debris from other houses. Coch, Nicholas K. and Manfred P. Wolff, "Effects of Hurricane Hugo Storm Surge in Coastal South Carolina," *Journal of Coastal Research.* Special Issue No. 8. Spring 1991.

benefit the beachfront property owner. Even where the only immediate injury may be a receding shoreline caused by accelerated erosion, it is generally the public that must pay for extremely costly beach renourishment projects.[11]

The question presented by this case is not simply the question of what the South Carolina law would do to the owner of the beachfront lot, but what harm that owner, and others similarly situated, would do to the property and resources of others. As Professor Sax has written:

> Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries....Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user.

Sax, *Takings, Private Property and Public Rights,* 81 Yale L.J. 149, 152 (1971).

B. Prohibition Of A Harmful Use Of Property Does Not Constitute An Unconstitutional Taking Of Property Even If There Is No Other Economically Viable Use.

Under the common law all property was deemed held subject to the maxim *"sic utere tuo ut alienum non laedas"* (use your own property in such a manner as not to injure

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11 Federal costs for Hurricane Hugo were $1.6 billion for disaster relief and $364 million for flood insurance payments. GAO Report. 1991. "Disaster Assistance: Federal, State, and Local Responses to Natural Disasters Need Improvement." Report to Congressional Requesters. GAO/RCED-91-43.

that of another). In 1987 this Court reaffirmed the vitality of the maxim in the face of a Fifth Amendment takings challenge:

> While each of us is burdened somewhat by...restrictions [on use of property], we, in turn, benefit greatly from the restrictions that are placed on others. [Citations omitted.] These restrictions are "properly treated as part of the burden of common citizenship." [Citation omitted.] Long ago it was recognized that "all property in this country is held under the implied obligation that the owner's use of it shall not be injurious to the community," *Mugler v. Kansas,* 123 U.S. at 65...*and the Takings Clause did not transform that principle to one that requires compensation whenever the State asserts its power to enforce it.*

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 491-492 (1987) (emphasis added).[12]

Keystone addressed a number of important questions that had clouded the field of takings jurisprudence. First, in distinguishing *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922), the decision stated that that was the "case of a

12 Justice O'Connor, dissenting in *Keystone, supra,* subsequently, in *First English Evangelical Lutheran Church v. Los Angeles County,* 482 U.S. 304, 362 (1987), concurred in the dissenting opinion of Justice Stevens that reiterated the principles of *Keystone.* The majority decision in *First English* did not determine whether a taking existed on the facts alleged but rather decided the strictly legal question of whether a temporary taking would require compensation to the property owner. On remand, the California appellate court, relying heavily on Justice Stevens' dissent, found that an interim county ordinance prohibiting construction in a floodplain did not constitute a taking. *First English Evangelical Lutheran Church v. County of Los Angeles,* 210 Cal.App.3d 1353, 258 Cal.Rptr. 893 (Cal.Ct.App. 1989), *cert. denied,* 493 U.S. 1056 (1990).

single house," that the interests in conflict were private, and that the Kohler Act, which sought to prevent subsidence caused by mining, was not aimed at protecting the public but rather sought only a "balancing of the private economic interests of coal companies against the private interests of the surface owners." *Keystone, supra,* at 485. Justice Holmes, in writing for the majority, had not taken issue with Justice Brandeis' opinion that the State has an absolute right to prohibit land use that amounts to a public nuisance but simply had disagreed with Justice Brandeis over whether the Kohler Act represented such a prohibition. *Id.* at 488 n. 17.

Second, the Court made it clear that *Pennsylvania Coal* had not overruled *Mugler v. Kansas,* 123 U.S. 623 (1887), and a long line of cases that stood for the proposition that a

> prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or appropriation of property....

Keystone, supra, at 489 (quoting *Mugler, supra,* at 668-669). The *Keystone* decision pointed directly to *Miller v. Schoene,* 276 U.S. 272 (1928), decided just five years after *Pennsylvania Coal* by a unanimous Court. In *Miller,* the Court held that the Takings Clause did not require the State of Virginia to compensate the owners of infected cedar trees for the value of the trees that State had ordered destroyed. *Miller* ruled that the State did not exceed its constitutional powers by deciding to *destroy* one class of property (healthy cedar trees) in order to save another which was, in the judgment of the Virginia legislature, of greater value to the public (apple trees). Here, South Carolina has chosen to limit one property interest to preserve other property, public resources *and* the public safety.

The Court noted in *Keystone* that it had "repeatedly upheld regulations that destroy or adversely affect real property interests," 480 U.S. at 488 n. 18, and the fact that a property owner was denied the "economically viable use of his land," although recognized as a factor in takings analysis, would not require compensation where "the public interest in preventing activities similar to public nuisances is a substantial one...." *Id.* at 492. *Mugler, supra,* said expressly that the police power would tolerate the "destruction of property" to abate a public nuisance, see 123 U.S. at 669, and *Miller v. Schoene,* 276 U.S. at 279-280, said exactly the same thing, relying on *Mugler, Hadacheck v. Los Angeles,* 239 U.S. 394 (1915), and a host of other cases. In *Hadacheck,* this Court, acknowledging that petitioner's brickyard was "a business, lawful in itself," and that the clay found on petitioner's property could not be economically transported elsewhere, nevertheless ruled that the business could be terminated by the lawful exercise of the police power, "one of the most essential powers of government, one that is the least limitable." 239 U.S. at 410. This Court therefore affirmed the California Supreme Court, which, it pointed out, had decided the case "from the standpoint of the offensive effects of the brickyard and not from the deprivation of the deposits of clay...." 239 U.S. at 411. *Hadacheck* thus echoes, although it does not cite, a case decided one year earlier, *Atlantic Coast Line Railroad Co. v. City of Goldsboro,* 232 U.S. 548 (1914), wherein this Court opined that "the State, in the exercise of the police power, may legitimately extend the application of the principle that underlies the maxim *sic utere tuo ut alienum non laedas,* so far as may be requisite for the protection of the public." *Id.* at 558.

In *Keystone* the dissenting opinion suggested that the nuisance exception applied only to "misuses" of property, not "legal" uses. *See Keystone, supra,* at 512 (Rehnquist, C.J., dissenting). There is, however, no clearcut and controlling distinction between a "legal use" and a "misuse" of property.

Curtin v. Benson, 222 U.S. 78 (1911), does not establish such a dichotomy because there the use, grazing cattle, was legal and did not cause any harm. *Hadacheck,* decided after *Curtin v. Benson,* expressly rejected the argument that "a necessary and lawful occupation that is not a nuisance *per se* cannot be made so by legislative declaration." 239 U.S. at 410. The police power allows the State "to declare that in particular circumstances and in particular localities a livery stable shall be deemed a nuisance in fact and a nuisance in law." *Id.* at 411 (quoting *Reinman v. Little Rock,* 237 U.S. 171 [1915]). *See also Goldblatt v. Town of Hempstead,* 369 U.S. 590 (1962), a hazard-related case in which the town prohibited sand and gravel mining below the water table to prevent formation of dangerous pools of water. Petitioner's land had no other apparent economic use. This Court, relying on, *inter alia, Hadacheck, Reinman* and *Mugler,* ruled that an otherwise valid exercise of the police power that deprives property of its most beneficial use is not unconstitutional.

Thus, under this theory, even certain residential development, because of untoward effects, can be prohibited as a nuisance in fact and in law. In *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395-396 (1926), the Court stated that apartment houses, while highly desirable in the proper environment, "come very near to being nuisances" in areas dedicated to private homes. The question is one of effects. This being so, development that is destructive to an essential safety feature of a barrier island can rightly be deemed a nuisance. *See McNulty v. Town of Indialantic,* 727 F.Supp. 604 (M.D. Fla. 1989) (upholding ordinance prohibiting residential structures seaward of setback line). *See also McCarthy v. City of Manhattan Beach,* 41 Cal.2d 879, 264 P.2d 932 (Cal. 1954) (sustaining zoning ordinance that restricted oceanfront property to beach recreation uses because site was subject to erosion and wave damage and safety of residences would be in question).

Under the foregoing authority, state and local governments have always had broad powers to prevent or abate harmful uses of property. They must retain the authority to deny development that has harmful effects without fear of incurring massive liability. This fear is of particular concern in view of their liability under *First English, supra,* for even temporary takings. Petitioner's reformulation of takings jurisprudence would require compensation *whenever* a property owner cannot use his land without causing serious harm. Given the tendency of many developers to propose high density development as the only feasible economic use of their land, such a principle could be devastating to government. *See, e.g., Graham v. Estuary Properties, Inc.,* 399 So.2d 1374 (Fla. 1981), *cert denied sub nom., Taylor v. Graham,* 454 U.S. 1083 (1981) (proposing 26,500 dwelling units on 1,800 acres of mangroves as the only viable use). Many governments, fearful of having to purchase such land at its "highest and best use," may well abandon effective regulation. Historically, however, the principle has been clear: government is not compelled to regulate by purchase. *Andrus v. Allard,* 441 U.S. 51, 65 (1979).

C. The Petitioner Has Not Proved A Taking, Having Conceded That Building On The Beach/Dune System Would Be Harmful.

The Beachfront Management Act, if implemented, will protect lives, property and other resources. The petitioner conceded as much in the proceedings below. The record shows that the Lucas property lies foursquare on the area of the beach that the Act is intended to protect. It could not be more exposed to storms and hurricanes. Just within the last three years, Hurricane Hugo caused many deaths and billions of dollars in property damage along the coast of South Carolina and created a twenty-foot storm surge that swept across three barrier islands. *See* notes 9 and 10, *supra.*

There is no disputing that construction of permanent buildings on the beach/dune system constitutes a clearcut danger not just to the individuals who occupy those structures but to those landward whose protection against flooding is reduced and whose exposure to wind-driven debris materially increased. The petitioner never sought to join issue on these facts when he filed his lawsuit to compel purchase of the lots. He did not begin to meet his burden of proof to show that the law was unreasonable. *See Goldblatt, supra,* at 596 (exercise of the police power is presumed to be constitutionally valid, and burden is on one challenging ordinance to prove it unreasonable). The single question the petitioner posited in the absence of any challenge to *either* the purposes of the South Carolina law *or* whether those purposes were served by the denial of permanent structures on his property was simply whether he was entitled to compensation. This Court addressed precisely such a claim in *Keystone:*

> "[T]he issue of compensation cannot arise until the question of justification has been disposed of. In the typical nuisance prevention case, the question is resolved against the claimant."

480 U.S. at 492 n. 22, quoting R. Epstein, *Takings* (1985). Petitioner conceded justification. He has not, therefore, proved a taking, and he is not, therefore, entitled to compensation.

D. Laws Intended To Prevent Harmful Uses Of Property Are Constitutional If Not Unnecessarily Harsh, But The State's Determination Of Legitimate Public Purposes Is Entitled To Substantial Judicial Deference.

The *amici* States acknowledge that government is not free to act arbitrarily in the exercise of the police power to

prevent harms. Although the judiciary does not "sit as a 'superlegislature to weigh the wisdom of legislation,'" *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 124 (1978) (quoting *Ferguson v. Skrupa,* 372 U.S. 726, 731 [1963]), it may nevertheless examine a law to determine whether it "bears a reasonable relation" to a "legitimate government purpose." *Exxon Corp., supra,* at 124-125. Under the Fifth Amendment Takings Clause, the court has indicated that the law must "substantially advance a legitimate state interest." *Nollan v. California Coastal Comm'n,* 483 U.S. 825 (1987). The concern for public health and safety may not be invoked to justify means not reasonably — or in this case substantially — related to the achievement of public protection, and *unnecessary* harshness in such means should not survive the test.

Such a test is consistent with *Pennsylvania Coal.* When Justice Holmes wrote of a "regulation [that] goes too far" he was speaking of its character, not the degree of restriction, for, as an example, he pointed to the permissible destruction of a house to stop a conflagration. It is the *nature* of a regulation that is critical. *Keystone, supra,* at 488.

There can be no question that prohibition of permanent buildings on the beach/dune system *substantially* advances the interests embodied in the South Carolina Beachfront Management Act and other state laws for the protection of coastal areas. There is uncontradicted evidence in the record that South Carolina's "inlet erosion zones" and "standard erosion zones" have very different patterns of erosion and accretion and that inlet erosion zones can rapidly erode and accrete over hundreds of feet. Although harsh, the prohibitions

of the 1988 Act are not unnecessarily so. Until now, the Petitioner has not even attempted a contrary argument.[13]

Likewise, there can be no question as to the *legitimacy* under the police power of the purposes served by the Act. Although the petitioner now questions those purposes, the States submit that this Court has historically deferred to the legislative branch of government on this issue, and that such deference is in order here. In the exercise of the police power, "the largest discretion is allowed." *Mugler, supra* at 669, quoting *Stone v. Mississippi,* 101 U.S. 814 (1880). *See also, Hadacheck, supra,* at 410; *Goldblatt, supra,* at 596; *Reinman, supra,* at 177; *Powell v. Pennsylvania,* 127 U.S. 678, 685 (1888). A legislature may decide one class of property

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13 In contrast, *Nollan, supra,* involved the notion that requiring an oceanfront property owner to dedicate an easement to the public over his private beach area would somehow promote "visual access" to the beach from the public road on the *opposite* side of the property and thus promote public access to the public part of the beach. The Court rejected this contention.

More on point, state courts, for example, have recognized that flood hazards may justify a prohibition on residential and other construction. *See, e.g., Maple Leaf Inv., Inc. v. State Dept. of Ecology,* 88 Wash.2d 726, 565 P.2d 1162 (1977); *Turnpike Realty Co. v. Town of Dedham,* 362 Mass. 221, 284 N.E.2d 891 (1972), *cert. denied,* 409 U.S. 1108 (1973); *First English v. County of Los Angeles,* 210 Cal.App.3d 1353, 258 Cal. Rptr. 893 (Cal.App. 1989), *cert. denied,* 493 U.S. 1056 (1990); *Turner v. County of Del Norte,* 24 Cal.App.3d 311, 101 Cal. Rptr. 93 (Cal.App. 1972). *See also, Pope v. City of Atlanta,* 242 Ga. 331, 249 S.E.2d 16 (1978), *cert. denied,* 440 U.S. 936 (1979); *Usdin v. State, Dept. of Envtl. Protection,* 173 N.J.Super. 311, 414 A.2d 280 (1980), *aff'd,* 430 A.2d 949 (N.J. 1981). State courts have also upheld the denial of permits, reasoning that certain property is inherently unsuited to development. *State of New Hampshire Wetlands Bd. v. Marshall,* 127 N.H. 240, 500 A.2d 685, 689 (1985); *Claridge v. New Hampshire Wetlands Board,* 125 N.H. 745, 485 A.2d 287 (1984); *Rowe v. Town of North Hampton,* 131 N.H. 424, 553 A.2d 1331 (1989); *Just v. Marinette County,* 56 Wisc.2d 7, 201 N.W.2d 761 (1972); *Carter v. South Carolina Coastal Council,* 281 S.C. 201, 314 S.E.2d 327 (1984); *Graham v. Estuary Properties, Inc.,* 399 So.2d 1374 (Fla.), *cert. denied sub. nom., Taylor v. Graham,* 454 U.S. 1083 (1981).

(infected cedars) must be destroyed to save another (apple trees), and the Court need not "weigh with nicety the question whether the infected cedars constitute a nuisance according to common law; or whether they may be so declared by statute." *Miller v. Schoene, supra,* at 279-280.

The Court's recent decision in *Keystone* reaffirmed this deference, noting that the lower courts in that case "were both convinced that the legislative purposes set forth in the statute were genuine, substantial, and legitimate, and we have no reason to conclude otherwise." 480 U.S. at 486. Although a court may examine a statute to determine whether its details call into question its stated public purposes, *id.* at 487 n. 16, no such inquiry was sought in the lower courts in this case and none should be undertaken now. As Justice Stevens has written, "[a] presumption of validity is particularly appropriate...because the complaint did not even allege that the ordinance is invalid, or pray for a declaration of invalidity or an injunction against its enforcement." *First English Evangelical Lutheran Church, supra,* at 327 (Stevens, J., dissenting).

III. EVEN IF THE ACT DOES NOT PREVENT A NUISANCE USE OF PROPERTY, PETITIONER SHOULD NOT BE ENTITLED TO COMPENSATION ON THIS RECORD.

Should the Court decide that *Mugler* principles are not controlling here and that it should proceed itself with the *ad hoc* inquiry of *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124 (1978), there are a number of facts that suggest Mr. Lucas is not entitled to compensation, or at least to the amount the trial court awarded. The three factors considered under the ad hoc inquiry are: (1) the character of the government action; (2) the extent to which the regulation has interfered with distinct investment-backed

expectations; and (3) the economic impact of the regulation on the claimant. *Id.* at 124. These factors do not weigh in petitioner's favor.

First, the Act, as Mr. Lucas conceded, protects lives and property, a most compelling state interest. He had the burden to prove a law passed as a safety measure was unreasonable, *Goldblatt, supra,* and he did not attempt to do so. The law is therefore presumed constitutional. *Id.*

Second, Mr. Lucas knew that the area has been, and continues to be, subject to erosion. Revetments have been constructed to the east and west of his lots to control erosion. Those lots have been part of the active beach fifty percent of the time for the last forty years (R. 84). Within the last thirty years, the shoreline lay landward of the Lucas property; within the last twenty years, the lots remained at least partly ponded; within the last ten years, the erosion of a neighboring oceanfront house was prevented only by emergency action. Under the 1977 Act, the front dune of a beach was part of the "critical area" in which habitable structures were prohibited. Given the history and instability of this area, landward migration of the critical area was easily foreseeable. In view of his lengthy involvement with the development of Wild Dunes Mr. Lucas should have known that habitable structures on the lots would be highly exposed to storms and hurricanes. It was not reasonable for Mr. Lucas to have concluded that residential use was the "highest and best use" or even a feasible use of these lots. "[D]istinct investment-backed expectations are reasonable only if they take into account the power of the state to regulate in the public interest." *Pace Resources, Inc. v. Shrewsbury Township,* 808 F.2d 1023, 1033 (3d Cir. 1987). His investment-backed expectation was highly uncertain from the beginning.

The trial court's conclusions as to economic impact are questionable. Courts have concluded that oceanfront land retains substantial value even if habitable structures cannot be built thereon. *McNulty, supra,* at 608. Diminution in value alone does not constitute a taking. *Penn Central, supra,* at 131. Mr. Lucas' right to put a trailer on the property has, in similar circumstances, been deemed a reasonable use sufficient to withstand a takings claim. *See Hall v. Board of Environmental Protection,* 528 A.2d 453 (Me. 1987) (construing state constitution).

The finding that the two lots were worth $1,170,000 is particularly unpersuasive, and diminution in value should not be measured from this inflated figure. Much of the value of these lots for construction purposes, as with any property in exposed and hazardous areas, is largely owed to supportive (and likewise vulnerable) public infrastructure, available disaster relief and publicly subsidized flood insurance. *See National Flood Insurance Program,* 42 U.S.C. §§ 4001-4128. The innate value of the lots for other purposes remains undisturbed. If value the government itself has created must be adjusted through regulations in order to protect public health and safety, loss of this value should not be considered a taking; nor should loss of value that is based on a harmful use. Government should not have to pay compensation for the choices it must make to resolve conflicting demands, and to protect some rather than others. *See* Sax, *supra,* at 153-161; *Miller v. Schoene, supra. See also* Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights,* 37 Kan. L. R. 529 (1989). The Act is a clear decision to afford less public support to the most vulnerable property (note the Act's restrictions on rebuilding in the dune area, § 48-39-290) and more protection to inland dwellers.

Decisions about public safety are the most important and basic the government makes and they should not be displaced by courts in the absence of an appropriate record. Hurricanes and severe storms are deadly phenomena. Government cannot in circumstances such as these protect everyone, but doing nothing is simply an abdication of its fundamental responsibility to the larger community. It must not be required to pay compensation because of a necessary choice.

CONCLUSION

This appeal should be dismissed. In the alternative, the judgment may be vacated to enable petitioner to apply for a building permit pursuant to the 1988 and 1990 amendments.

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